

Securities and Exchange Commission

§ 229.508

Exchange Act immediately prior to filing of the registration statement, there shall be included a comparison of the public contribution under the proposed public offering and the effective cash contribution of such persons. In such cases, and in other instances where common equity securities are being registered by a registrant that has had losses in each of its last three fiscal years and there is a material dilution of the purchasers' equity interest, the following shall be disclosed:

(a) The net tangible book value per share before and after the distribution;

(b) The amount of the increase in such net tangible book value per share attributable to the cash payments made by purchasers of the shares being offered; and

(c) The amount of the immediate dilution from the public offering price which will be absorbed by such purchasers.

§ 229.507 (Item 507) Selling security holders.

If any of the securities to be registered are to be offered for the account of security holders, name each such security holder, indicate the nature of any position, office, or other material relationship which the selling security holder has had within the past three years with the registrant or any of its predecessors or affiliates, and state the amount of securities of the class owned by such security holder prior to the offering, the amount to be offered for the security holder's account, the amount and (if one percent or more) the percentage of the class to be owned by such security holder after completion of the offering.

§ 229.508 (Item 508) Plan of distribution.

(a) *Underwriters and underwriting obligation.* If the securities are to be offered through underwriters, name the principal underwriters, and state the respective amounts underwritten. Identify each such underwriter having a material relationship with the registrant and state the nature of the relationship. State briefly the nature of the obligation of the underwriter(s) to take the securities.

Instruction to paragraph 508(a): All that is required as to the nature of the underwriters' obligation is whether the underwriters are or will be committed to take and to pay for all of the securities if any are taken, or whether it is merely an agency or the type of *best efforts* arrangement under which the underwriters are required to take and to pay for only such securities as they may sell to the public. Conditions precedent to the underwriters' taking the securities, including *market-outs*, need not be described except in the case of an agency or *best efforts* arrangement.

(b) *New underwriters.* Where securities being registered are those of a registrant that has not previously been required to file reports pursuant to section 13(a) or 15(d) of the Exchange Act, or where a prospectus is required to include reference on its cover page to material risks pursuant to Item 501 of Regulation S-K (§ 229.501), and any one or more of the managing underwriter(s) (or where there are no managing underwriters, a majority of the principal underwriters) has been organized, reactivated, or first registered as a broker-dealer within the past three years, these facts concerning such underwriter(s) shall be disclosed in the prospectus together with, where applicable, the disclosures that the principal business function of such underwriter(s) will be to sell the securities to be registered, or that the promoters of the registrant have a material relationship with such underwriter(s). Sufficient details shall be given to allow full appreciation of such underwriter(s) experience and its relationship with the registrant, promoters and their controlling persons.

(c) *Other distributions.* Outline briefly the plan of distribution of any securities to be registered that are to be offered otherwise than through underwriters.

(1) If any securities are to be offered pursuant to a dividend or interest reinvestment plan the terms of which provide for the purchase of some securities on the market, state whether the registrant or the participant pays fees, commissions, and expenses incurred in connection with the plan. If the participant will pay such fees, commissions and expenses, state the anticipated cost to participants by transaction or other convenient reference.

(2) If the securities are to be offered through the selling efforts of brokers or dealers, describe the plan of distribution and the terms of any agreement, arrangement, or understanding entered into with broker(s) or dealer(s) prior to the effective date of the registration statement, including volume limitations on sales, parties to the agreement and the conditions under which the agreement may be terminated. If known, identify the broker(s) or dealer(s) which will participate in the offering and state the amount to be offered through each.

(3) If any of the securities being registered are to be offered otherwise than for cash, state briefly the general purposes of the distribution, the basis upon which the securities are to be offered, the amount of compensation and other expenses of distribution, and by whom they are to be borne. If the distribution is to be made pursuant to a plan of acquisition, reorganization, readjustment or succession, describe briefly the general effect of the plan and state when it became or is to become operative. As to any material amount of assets to be acquired under the plan, furnish information corresponding to that required by Instruction 5 of Item 504 of Regulation S-K (§ 229.504).

(d) *Offerings on exchange.* If the securities are to be offered on an exchange, indicate the exchange. If the registered securities are to be offered in connection with the writing of exchange-traded call options, describe briefly such transactions.

(e) *Underwriter's compensation.* Provide a table that sets out the nature of the compensation and the amount of discounts and commissions to be paid to the underwriter for each security and in total. The table must show the separate amounts to be paid by the company and the selling shareholders. In addition, include in the table all other items considered by the National Association of Securities Dealers to be underwriting compensation for purposes of that Association's Rules of Fair Practice.

Instructions to paragraph 508(e): 1. The term "commissions" is defined in paragraph (17) of Schedule A of the Securities Act. Show separately in the table the cash commissions

paid by the registrant and selling security holders. Also show in the table commissions paid by other persons. Disclose any finder's fee or similar payments in the table.

2. Disclose the offering expenses specified in Item 511 of Regulation S-K (17 CFR 229.511).

3. If the underwriter has any arrangement with the issuer, such as an over-allotment option, under which the underwriter may purchase additional shares in connection with the offering, indicate that this arrangement exists and state the amount of additional shares that the underwriter may purchase under the arrangement. Where the underwriter has such an arrangement, present maximum-minimum information in a separate column to the table, based on the purchase of all or none of the shares subject to the arrangement. Describe the key terms of the arrangement in the narrative.

(f) *Underwriter's representative on board of directors.* Describe any arrangement whereby the underwriter has the right to designate or nominate a member or members of the board of directors of the registrant. The registrant shall disclose the identity of any director so designated or nominated, and indicate whether or not a person so designated or nominated, or allowed to be designated or nominated by the underwriter is or may be a director, officer, partner, employee or affiliate of the underwriter.

(g) *Indemnification of underwriters.* If the underwriting agreement provides for indemnification by the registrant of the underwriters or their controlling persons against any liability arising under the Securities Act, furnish a brief description of such indemnification provisions.

(h) *Dealers' compensation.* State briefly the discounts and commissions to be allowed or paid to dealers, including all cash, securities, contracts or other considerations to be received by any dealer in connection with the sale of the securities. If any dealers are to act in the capacity of sub-underwriters and are to be allowed or paid any additional discounts or commissions for acting in such capacity, a general statement to that effect will suffice without giving the additional amounts to be sold.

(i) *Finders.* Identify any finder and, if applicable, describe the nature of any material relationship between such finder and the registrant, its officers,

directors, principal stockholders, finders or promoters or the principal underwriter(s), or if there is a managing underwriter(s), the managing underwriter(s), (including, in each case, affiliates or associates thereof).

(j) *Discretionary accounts.* If the registrant was not, immediately prior to the filing of the registration statement, subject to the requirements of section 13(a) or 15(d) of the Exchange Act, identify any principal underwriter that intends to sell to any accounts over which it exercises discretionary authority and include an estimate of the amount of securities so intended to be sold. The response to this paragraph shall be contained in a pre-effective amendment which shall be circulated if the information is not available when the registration statement is filed.

(k) *Passive market making.* If the underwriters or any selling group members intend to engage in passive market making transactions as permitted by Rule 103 of Regulation M (§ 242.103 of this chapter), indicate such intention and briefly describe passive market making.

(l) *Stabilization and other transactions.*

(1) Briefly describe any transaction that the underwriter intends to conduct during the offering that stabilizes, maintains, or otherwise affects the market price of the offered securities. Include information on stabilizing transactions, syndicate short covering transactions, penalty bids, or any other transaction that affects the offered security's price. Describe the nature of the transactions clearly and explain how the transactions affect the offered security's price. Identify the exchange or other market on which these transactions may occur. If true, disclose that the underwriter may discontinue these transactions at any time;

(2) If the stabilizing began before the effective date of the registration statement, disclose the amount of securities bought, the prices at which they were bought and the period within which they were bought. If you use § 230.430A of this chapter, the prospectus you file under § 230.424(b) of this chapter or include in a post-effective amendment must contain information on the stabilizing transactions that took place be-

fore the determination of the public offering price; and

(3) If you are making a warrants or rights offering of securities to existing security holders and any securities not purchased by existing security holders are to be reoffered to the public, disclose in a supplement to the prospectus or in the prospectus used in connection with the reoffering:

(i) The amount of securities bought in stabilization activities during the offering period and the price or range of prices at which the securities were bought;

(ii) The amount of the offered securities subscribed for during the offering period;

(iii) The amount of the offered securities subscribed for by the underwriter during the offering period;

(iv) The amount of the offered securities sold during the offering period by the underwriter and the price or price ranges at which the securities were sold; and

(v) The amount of the offered securities that will be reoffered to the public and the public offering price.

[47 FR 11401, Mar. 16, 1982, as amended at 58 FR 19606, Apr. 15, 1993; 62 FR 543, Jan. 3, 1997; 62 FR 11323, Mar. 12, 1997; 63 FR 6384, Feb. 6, 1998]

§ 229.509 (Item 509) Interests of named experts and counsel.

If (a) any expert named in the registration statement as having prepared or certified any part thereof (or is named as having prepared or certified a report or valuation for use in connection with the registration statement), or (b) counsel for the registrant, underwriters or selling security holders named in the prospectus as having given an opinion upon the validity of the securities being registered or upon other legal matters in connection with the registration or offering of such securities, was employed for such purpose on a contingent basis, or at the time of such preparation, certification or opinion or at any time thereafter, through the date of effectiveness of the registration statement or that part of the registration statement to which such preparation, certification or opinion relates, had, or is to receive in connection with the offering, a substantial